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IN THE

Supreme Court of the United States

October Term, 1969

No. 1009

CORLON C. KELLER,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

Respondent.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

This is an appeal from the Order of the Court of Appeal for the State of California, Second Appellate District, denying, without opinion or hearing, petitioner's statutory Petition for a "Writ of Review" brought to review the Order of the California Alcoholic Beverage Control Appeals Board affirming the

Order of the Department of Alcoholic Beverage Control suspending petitioner's "on sale" beer license. The California Supreme Court denied, without opinion, a Petition for Hearing of the said Order of the California Court of Appeal.

JURISDICTION

The jurisdiction of this Court is invoked on the ground that the California Business and Professions Code Section 25600 has been sustained against a claim of unconstitutionality under the federal Constitution.

(i) Appellant was charged with a violation of California Business and Professions Code Section 25600, which prohibits "giv[ing] any premium, gift, or free goods in connection with the sale of any alcoholic beverage." Said charge was used as a basis for the suspension of petitioner's "on sale" beer license.

(ii) The suspension of petitioner's license was affirmed by the Alcoholic Beverage Control Appeals Board on June 26, 1969; his petition for writ of review was denied by the Court of Appeal on August 26, 1969; and his petition for a hearing before the California Supreme Court was denied on September 24, 1969. Notice of appeal was filed in the California Court of Appeal on October 21, 1969.

(iii) Jurisdiction of this Court is conferred by Title 28, United States Code, Section 1257(2).

(iv) Cases which sustain jurisdiction are: *Champlin Ref. Co. v. Corporation Commission*, 286 U.S. 210 (1943); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Morey v. Doud*, 354 U.S. 457 (1957); *Douglas v. California*, 372 U.S. 353 (1963); *Stirone v. United*

States, 361 U.S. 212 (1960).

STATUTES INVOLVED

California Business and Professions Code Section 25600:

"No licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale of any alcoholic beverage."

California Business and Professions Code Section 23090:

"Application for writ of review; person entitled; court; limitations.

"Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within 30 days after filing of the final order of the board. (Added Stats. 1967, c. 1525, p. 3635, sec. 4.)"

California Business and Professions Code Section 23090.1:

"Return of writ; time and place; direction; new or additional evidence not to be introduced; hearing on whole record.

"The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the department in the case to the court within the time specified. No new or addi-

tional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board."

California Business and Professions Code Section 23090.2:

"**Scope of review.**

"The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:

"(a) The department has proceeded without or in excess of its jurisdiction.

"(b) The department has proceeded in the manner required by law.

"(c) The decision of the department is supported by the findings.

"(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.

"(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

"Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

California Business and Professions Code Section 23090.3:

"**Conclusiveness of findings and conclusions; appearances of parties; judgment.**

"The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department."

QUESTIONS PRESENTED

I. Whether California Business and Professions Code Section 25600, as applied, violates the Fifth and Fourteenth Amendments' guarantee of due process because it is overly vague.

II. Whether California Business and Professions Code Section 25600 violates the equal protection clause of the Fourteenth Amendment because it bears no rational relationship to a legitimate state interest and is arbitrary and overbroad.

III. Whether California Business and Professions Code Sections 23090, 23090.1, 23090.2 and 23090.3 permitting, and the denial by the Court of Appeal and the California Supreme Court of, petitioner's Petition for Writ of Review and Petition for a Hearing—without any opinion and without any hearing—violates the constitutional guarantees of due

process and equal protection of the law.

IV. Whether the variance between the evidence presented and the conduct proscribed by Business and Professions Code Section 25600 is a violation of petitioner's right to due process of law.

STATEMENT OF THE CASE

[PAGE REFERENCES ARE TO THE REPORTER'S TRANSCRIPT OF THE PROCEEDING BEFORE THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, WHICH DOCUMENT HAS BEEN OR WILL BE TRANSMITTED TO THIS COURT IN THE CERTIFIED RECORD.]

The Department of Alcoholic Beverage Control charged that cause for disciplinary action had been established under Business and Professions Code Section 24200(a) and (b) on the basis that petitioner had on one or more occasions violated Business and Professions Code Section 25600 which makes it a misdemeanor to–

> " . . . directly or indirectly, give any premium, gift, or free goods *in connection with the sale of any alcoholic beverage*." (Emphasis added.)

After a hearing on the charges, the hearing officer found that petitioner did–

> " . . . directly give premiums, gifts, and free goods for the purpose of, and with the intent to encourage the sale and purchase of alcoholic beverages . . . . "

Motions were made to dismiss the Accusation on the ground that Section 25600 is unconstitutionally vague and on the further ground that the Accusation did not state an

offense cognizable under that section (*i.e.*, that there was a fatal variance between the conduct proscribed by the statute and the conduct proven by the evidence). These motions were denied (R. 4).

The evidence showed that two ABC investigators observed and participated in free lottery drawings at petitioner's place of business and observed or participated in an occasion on the same dates when dollar bills were blown out of the ventilator shaft. The investigators made no attempt at that time to inform petitioner that he had violated any law, nor did they make any attempt to issue a misdemeanor complaint (R. 22-23).

No evidence was presented which tended to show that the lottery drawings or the dollar bill blowing was "in connection with" the sale of alcoholic beverages. Non-alcoholic beverages are sold at petitioner's place of business, and some of the customers present were not drinking alcoholic beverages.

Petitioner testified that he did not know that his acts were unlawful (if, in fact, they were) and that he stopped giving away prizes when informed by the ABC that he was violating the law (R. 33-35). He was told that he "could not give away to entice people to drink" (R. 43). He complied with the ABC's version of the law, although he did not feel that he was enticing people to drink: "I was requiring nothing of the patrons. That's why I had a juice bar, because there are a lot of people that don't want to drink alcoholic beverages . . ." (R. 43).

By refusing to consider the judgment of the Alcoholic Beverage Control Appeals Board, the California Supreme Court has decided against petitioner's attacks on the statute. It has, in effect, held that the federal constitutional attack

raised by petitioner has no merit, and therefore an appeal lies to this Court.

SUBSTANTIALITY OF THE QUESTIONS

The Department of Alcoholic Beverage Control regulates all sales of alcoholic beverages in California, our most populous state. The effect of a suspension or revocation of a license by the Department may be very serious but, *at its most minimal*, is a denial of property, which must be accompanied by due process of law. The infirmities in the instant case would not be tolerated in a more "substantial" criminal matter and, petitioner submits, cannot be tolerated here where substantial constitutional questions are raised. See *Morissette v. United States*, 342 U.S. 246 (1952). Before the ABC, no less than in other penal matters, those accused are entitled to something more than casual justice, for casual justice is no justice at all and is a denial of the due process of law which is guaranteed by the United States Constitution.

ARGUMENT

I

California Business and Professions Code Section 25600 Is Void For Vagueness Since A Man Of Ordinary Intelligence Could Not Govern His Conduct In Such A Way As To Avoid Prosecution Merely By Reading The Statute.

The question is whether the statute is couched in "words and phrases . . . so vague and indefinite that any penalty

prescribed for [its] violation constitutes a denial of due process of law." *Champlin Ref. Co. v. Corporation Commission, supra,* 286 U.S. 210, 243. As applied, Section 25600 meets that test.

While different standards apply to questions of vagueness when freedom of speech is not at stake (see Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67, 74-75 [1960]), this Court has insisted that every sanction that is penal in nature must adequately inform those who might come within its purview the conduct that is proscribed with sufficient particularity so that they might guide their conduct thereby. *Lanzetta v. New Jersey, supra,* 306 U.S. 451; *Connally v. General Constr. Co., supra,* 269 U.S. 385. Statutes must also provide a certain standard for the determination of guilt. *Giaccio v. Pennsylvania, supra,* 382 U.S. 399.

The application of Section 25600 to *any* gift by a licensee is not something that could have been foreseen by that licensee merely by reading the statute. What we have here is a penal statute which "forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co., supra,* 269 U.S. at 391.

II

California Business and Professions Code Section 25600 Is Invalid Under The Equal Protection Clause Of The Fourteenth Amendment Because It Bears No Rational Relation To a Legitimate State Interest And Is Arbitrary

And Overbroad.

Section 25600, as applied, is invalid because it causes "different treatments . . . so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. Saint Louis*, 347 U.S. 231, 237 (1954). The statute "is without any reasonable basis and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Always, "a statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found." *Morey v. Doud*, 354 U.S. 457, 465 (1957).

The state of California has not seen fit to proscribe the sale of alcoholic beverages but, as some kind of vestige of prohibition, seeks to discriminate against those who sell them. The only rational basis for Section 25600 would be that alcohol is bad; but if that is the case, then the state should prohibit its sale, not make things difficult for its sellers.

Even if the section bore a rational relation to a legitimate state interest, it would be invalid because, as applied, it is overbroad. For, if the state can legitimately so inhibit sales of alcoholic beverages, its method here—proscription of the giving of premiums (even if the purpose is to attract more patrons; is essentially "advertising") by bar owners whether or not actually connected with such sales—is not the least onerous method of achieving that end.

III

The Failure Of The Courts To Adequately Review The Decision Of The Department Of Alcoholic Beverage Control Is A Denial Of Due Process.

The failure of the state appellate courts to provide adequate judicial review is analogous to the "meaningless ritual" deplored by this Court in *Douglas v. California, supra,* 372 U.S. 353, 358 (1963). There is no doubt about the importance of appellate review (*Douglas, supra; Griffin v. Illinois,* 351 U.S. 12 [1956]); and there is no exception to the right to equal review (*i.e.*, once a state decides to afford judicial review) where, as in *Griffin* and *Douglas,* the appellants are poor nor, as in *Morissette,* the penalty is "insignificant."

IV

The Decision Suspending Petitioner's License Must Be Reversed Since There Was A Fatal Variance Between The Conduct Proven By The Evidence And The Conduct Proscribed By The Statute.

If Business and Professions Code Section 25600 is held not to be vague (see I, *supra*), then the decision below must be reversed for the failure to prove a violation of that statute as written. It is a fundamental requirement of due process that the offense charged be proven; the proof of another offense cannot sustain a conviction. *Cf. Stirone v. United States, supra,* 361 U.S. 212; *Russell v. United States,* 369 U.S. 749 (1962). This is true *a fortiori* where the conduct proven is not a crime at all (see Statement Of The Case, *supra*).

CONCLUSION

For the reasons stated above, this appeal involves serious unresolved constitutional questions which this Court should decide.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

APPENDIX

Post Card Denial of Petition for Writ of Review, Second Appellate District, Court of Appeal for the State of California.

Post Card Denial of Petition for Hearing, Supreme Court of the State of California.